Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

KYONG SUK HACKBARTH a.k.a.
Kyungsuk Hackbarth,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the right to due process is denied where Petitioner's appeal to the United States Court of Appeals for the Ninth Circuit is dismissed for lack of jurisdiction as out of time where Petitioner appealed a ruling of the Board of Immigration Appeals ("BIA") denying an Application for Termination of Deportation Proceedings (the "Order") and the Order, dated August 30, 1999, is delivered via the United States mail to Petitioner and Petitioner mails her petition for review of deportation order to the United States Court of Appeals within thirty (30) days of the entry of the Order.

2. Whether the Petitioner's right of due process is denied where Petitioner's appeal to the United States Court of Appeals for the Ninth Circuit is dismissed for lack of jurisdiction as out of time where the Code of Federal Regulations ("C.F.R.") applicable to the Immigration and Naturalization Service ("INS") provides that whenever a person has a right or is required to do some act within a prescribed period of time after service of a notice upon him and by mail, three days shall be added to the prescribed period and that service by mail is complete upon mailing and where the INS is required by its own regulations to serve decisions of the BIA by U.S. mail and the Court of Appeals having received a petition for review thirty-one (31) days after its issuance dismissed for lack of jurisdiction.

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II. Where There is No Local Facility Available to the Petitioner to Perfect the Appeal Either at the U.S. District Court or Through Another INS Office to be Granted Sufficient Due Process, Filing Should Have Been Completed Upon its Placing in the United States Mail, which is the Last Act over which the Petitioner has any Control. This is Consistent with Previous Holdings of this Court. The Ninth Circuit Court of Appeals by Failing to Apply the Rules of the BIA that Would Allow an Extra Three Days to Respond to Documents Served Upon Petitioners When Served by U.S. Mail Or By Considering Documents Filed And Placed in the U.S. Mail Denied the Due Process Rights of Petitioner 4

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Kyong Suk Hackbarth ("Petitioner"), respectfully prays that a writ of certiorari issue to review the April 4, 2000 Order of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Order Denying Petitioner's Petition for Rehearing En Banc filed in the United States Court of Appeals for the Ninth Circuit on April 4, 2000 is unreported. A copy is reprinted in Petition Appendix ("App.") beginning at App. 1. The unreported Order of the United States Court of Appeals for the Ninth Circuit Granting Respondent Immigration and Naturalization Service's Motion to Dismiss Petition for Review filed in the Ninth Circuit on January 24, 2000 is attached at App. 2.

STATEMENT OF JURISDICTION

Petitioner seeks review of the April 4, 2000 Ninth Circuit Court of Appeals' Order Denying Petition for Rehearing En Banc of its Order of January 24, 2000 that dismissed the Petition for review for lack of jurisdiction on the grounds that the Petition for Review was out of time.

The United States Supreme Court has jurisdiction to review this case from the Circuit Court of Appeals by virtue of 28 U.S.C. § 1254.

STATEMENT

The Board of Immigration of Appeals ("BIA") denied petitioner's application for termination of deportation proceedings by Order dated August 30, 1999, a copy of which is attached at App. 3. Petitioner's Petition to the Court of Appeals was postmarked September 28, 1999. The Court of Appeals' record indicates that it received the Petition for Review of the August 30, 1999 Order on September 30, 1999, more than thirty days, but less than thirty-three days from the date of the BIA's order.

Unlike appeals from orders of the District Court, appeals from orders of the BIA can only be filed at the United States Court of Appeals. Petitioners in the Ninth Circuit occupy a significant part of the total land and sea mass of the planet but are granted no consideration for the extra borders and geography placed on them. This Court, in its own Rules, acknowledges that placing it in the mail, with proof of that by mail by postmark, removes any uncertainty that might derive from the manner of determining when a document is filed in use in the Court of Appeals for the Ninth Circuit. That Court in *Gonzalez-Julio v. INS*, 34 F.3d 82 (9th Cir. 1994), acknowledged this inconsistency as applied to an appeal of a decision of the INS to the BIA. The Court held that the United States could show no interest in rigid adherence to the ten-day appeal period when viewed in light of the logistical difficulties placed upon petitioners who reside in Hawaii.

The Code of Federal Regulations ("C.F.R.") that controls the conduct of proceedings before the Immigration and Naturalization Service ("INS"), including the practice

before the BIA, provides that the service of Board decisions shall be transmitted and served upon an alien. 8 C.F.R. § 3.1(f). Further, 8 C.F.R. § 103.5a(b) provides that effective service by mail allows an additional three days to be prescribed when service of a notice is served by mail. By statute, Congress has granted a petitioner seeking review of BIA decisions thirty days within which to file a petition for review of a final order of removal. 8 U.S.C. § 1252(b)(1). In the present case, the Petitioner was served with the notice denying her request for termination of deportation proceedings by U.S. mail. The Petition for Review of the BIA's Order was received by the Court of Appeals, pursuant to the U.S. mail return notification, thirty-one days from the date of the filing of the BIA's order. The Petition actually was not filed, however, until some four days later on October 4. The Petitioner has no control over when the Ninth Circuit actually files a document when it is presented through the United States mail, nor does the Petitioner have the ability to perfect an appeal by filing it with the U.S. District Court for her district or at any local INS office. The appeal must be filed in the Court of Appeals in San Francisco. The record below demonstrates that the Petition to the Court of Appeals was placed in the mail less than thirty (30) days from the filing of the Order of the BIA.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Dismissal of the Appeal as Out of Time Denied Due Process on the Grounds that the Filing of the Document is Not Defined by Statute and It Is the Custom and Practice of this Court to Permit the Filing of an Appeal to be Perfected Upon its Placing in the United States Mail.

II. Where There is No Local Facility Available to the Petitioner to Perfect the Appeal Either at the U.S. District Court or Through Another INS Office to be Granted Sufficient Due Process, Filing Should Have Been Completed Upon its Placing in the United States Mail, which is the Last Act over which the Petitioner has any Control. This is Consistent with Previous Holdings of this Court. The Ninth Circuit Court of Appeals by Failing to Apply the Rules of the BIA that Would Allow an Extra Three Days to Respond to Documents Served Upon Petitioners When Served by U.S. Mail Or By Considering Documents Filed And Placed in the U.S. Mail Denied the Due Process Rights of Petitioner.

This Petition derives from the simple premise that a person should be allowed her day in court. In the present circumstances, the Petitioner sought review of the BIA's Order that would have prevented the deportation of a resident of the United States, a mother of a United States citizen child and the spouse of a United States citizen, who simply sought review by the Ninth Circuit of the findings of the BIA. Congress has restricted the rights of petitioners seeking review of decisions by enacting the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(c). Congress has not, however, overridden the overriding

Constitutional requirement under the Constitution of due process.

III. Where the Rules of Court are Not clear, this Court Should Affirmatively Set a Bright Line so that Parties may be Clearly Apprized of the Rules that are Applicable to Proceedings in Regard to Practice Before the Courts of Appeals.

In this case, it is unclear precisely when a document is considered "filed" in the United States Court of Appeals. This Court has recognized that this term has not been sufficiently defined in rules of court and has adopted in Supreme Court Rule 29(2) the rule that filing should be when the last act occurs over which the petitioner has any control. *See also Houston v. Lack, Warden,* 467 U.S. 266 (1988) (pro se prisoner last act was to deliver to prison authorities). In this case, the Order was received from the BIA by First Class Mail, and it was filed within thirty days of the Order having been issued if filing were to occur when it was placed in the United States mail.

Unlike appeals from orders of the District Court, appeals from orders of the BIA can be filed only at the United States Court of Appeals. Petitioners in the Ninth Circuit occupy a significant part of the total land and sea mass of the planet but are granted no consideration for the extra burdens that geography places on them. This Court, in its own Rules, acknowledges that placing the notice in the mail, with proof by postmark, removes any uncertainty that might derive from the manner of determining when a document is filed. This rule should apply to the Court of Appeals for the Ninth Circuit. That court,

in *Gonzalez-Julio v. INS*, 34 F.3d 82 (9th Cir. 1994), acknowledged the additional burden placed on Hawaiian petitioners in a case involving an appeal of a decision of the INS to the BIA. In that case, the court held the United States failed to show an interest sufficient to maintain rigid adherence to the ten-day appeal period when viewed in light of the logistical difficulties placed upon petitioners who reside in Hawaii.

IV. Morever, the BIA's Own Rules Would have Granted an Additional Three Days if Service of the Order Upon the Petitioner was by First Class Mail.

There is an alternative ground for the Court to grant review of this Petition – simply that the BIA's order and all proceedings thereunder should be governed by the proceedings of the INS that would provide an extra three days when the service of the Order was by mail upon the Petitioner. In this case, the Ninth Circuit did not apply the BIA or the INS rules and regulations and simply chose a bright line rule that would disregard the rules of the BIA which practitioners and petitioners should be able to fairly rely upon when practicing before the BIA and the courts of appeals.

CONCLUSION

The prejudice to the Petitioner if the review is denied is great in that she will be deported from the United States. The prejudice to the Petitioner could be avoided simply by allowing the use of the INS's own regulations or another rule of court consistent with practice before the U.S. Supreme Court. The Court of Appeals, in denying the petition for review en banc, deprived the Petitioner of her due process rights, and Petitioner respectfully seeks review of this Honorable Court.

DATED: Honolulu, Hawaii, June 1, 2000.

Respectfully submitted.

WILLIAM F. THOMPSON, III
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KYONG SUK HACKBARTH a.k.a. Kyungsuk Hackbarth, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 99-71275 Agency No. A31-207-058 ORDER (Filed Apr. 4, 2000)

Before: BEEZER, O'SCANNLAIN, and THOMAS, Circuit Judges

The "Petition for Rehearing En Banc" is construed as a motion for reconsideration and petition for rehearing en banc of the court's January 24, 2000 order which dismissed this petition for review for lack of jurisdiction. So construed, the motion for reconsideration is denied. Judges O'Scannlain and Thomas voted to reject the petition for rehearing en banc, and Judge Beezer so recommends. The petition is rejected on behalf of the court. *See* 9th Circuit General Order 6.11.

Petitioner's motion for a stay of deportation is denied as moot.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KYONG SUK HACKBARTH a.k.a. Kyungshuk [sic] Hackbarth, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 99-71275 Agency No. A31-207-058 ORDER (Filed Jan. 24, 2000)

Before: BEEZER, O'SCANNLAIN, and THOMAS, Circuit Judges

In response to respondent's motion to dismiss the petition for review as untimely, petitioner submitted evidence that the court received the petition for review on September 30, 1999, 31 days after the date of the Board of Immigration Appeals' final order of deportation. However, the petition for review was due on September 29, 1999, within 30 days of the Board's decision. *See Narayan v. INS*, 105 F.3d 1355 (9th Cir. 1997).

Accordingly, respondent's motion to dismiss this petition for review for lack of jurisdiction is granted. *See id.*

All pending motions are denied as moot.

PETITION DISMISSED.

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Date: AUG 30 1999

File: A31 207 058 – Honolulu

In re: KYONG SUK *HACKBARTH* a.k.a.
Kyungsuk Hackbarth

IN REMOVAL PROCEEDINGS

APPEAL
ON BEHALF OF RESPONDENT:
Joseph M. Lovell, Esquire

ON BEHALF OF SERVICE: June Y.I. Ito
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION: Termination of proceedings

In an oral decision dated February 1, 1999, an Immigration Judge found the respondent removable as charged. The respondent has appealed the Immigration Judge's decision. The appeal will be dismissed.

On appeal, the respondent argues that the Immigration and Naturalization Service failed to establish that her crime fits within section 101(a)(43)(M)(i) of the Immigration and Nationality Act. 8 U.S.C. § 1101(a)(43)(M)(i), and

that she therefore is not removable. Section 101(a)(43)(i) of the Act defines a crime involving fraud or deceit in which the loss to the victim(s) exceeds $10,000 as an aggravated felony. The respondent was convicted of bank fraud and making false entries to bank records under 18 U.S.C. §§ 1344 and 1005. The respondent argues that because the judgment does not indicate a total amount of loss to the victim, the Service has failed to prove that the loss exceeded $10,000. She further contends that although the judgment shows a $73,338.92 restitution amount, this is not the same as the amount of loss.

Restitution by definition involves restoring a person to his original position prior to a loss. *See, e.g.*, BLACK'S LAW DICTIONARY 1180 (5th ed. 1979). The judgment in this case indicates a restitution amount of $73,338.92, as noted above (Exh. 5). Furthermore, the respondent was convicted, on her plea of guilty, of Counts 1 and 4 of the indictment (Exh. 5). Count 1 states that the respondent, in her capacity as an employee of the First Hawaiian Bank, increased limits on credit cards she and other family members owned to defraud and obtain funds from the Bank. Count 1 further states that the respondent made charges on these cards which exceeded the authorized credit limits by at least $78,022.63. A plea of guilty or a conviction conclusively proves the factual allegations set forth in those counts of the indictment to which the defendant pleads guilty. *See McCarthy v. United States*, 394 U.S. 459, 466 (1969); *United States v. Mathews*, 833 F.2d 161 (9th Cir. 1987); *see also Souejti v. INS*, 1999 WL 543754 (9th Cir.) (observing that sentencing documents and a plea agreement supported a finding that the loss to the victim(s) exceeded $10,000). We therefore find that the

record supports the finding that the respondent was convicted of an aggravated felony under section 101(a)(43)(M)(i) of the Act, and is removable as charged.

According, we will enter the following order.

ORDER: The appeal is dismissed.

/s/ _____
FOR THE BOARD